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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE PECHANGA BAND OF MISSION INDIANS,

Petitioner,

vs.

KACOR REALTY, INC., etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, the Pechanga Band of Mission Indians, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 22, 1982.

QUESTIONS PRESENTED

1. Under the Mission Indian Relief Act of January 12, 1891, was it essential for the Secretary of the Interior to include in a formal patent *all* parcels to be included in an Indian tribe's reservation, thereby terminating whatever interest the tribe may have had in a parcel excluded from the patent but included in the reservation by the previous Congressionally-authorized Presidential Executive Order of June 27, 1882?

2. Is it clear from the surrounding circumstances and legislative history of the Mission Indian Relief Act of January 12, 1891 that the Secretary of the Interior intended to terminate a portion of the Pechanga Indian Reservation created by a previous Congressionally-authorized Presidential Executive Order when the following circumstances existed: (1) the parcels in question had previously been patented to a homesteader who admittedly obtained his patents by fraud against the United States; (2) the United States began, but then abandoned, efforts to annul the fraudulent patents; and (3) the avowed purpose of the Act was to protect, not to diminish, the rights of tribes in lands previously reserved to them under previous Congressionally-authorized Presidential Executive Orders?

3. If, as the Court of Appeals held, the failure of the Secretary of the Interior to include in a patent under the Mission Indian Relief Act of January 12, 1891 certain parcels of land previously included in an Indian Reservation by a Congressionally authorized Presidential Executive Order removed those parcels from the reservation, without any revocation of that previous Executive Order and without any express restoration of the omitted parcel to the public domain, then why was it necessary for the

President to make such an express revocation and restoration by another Executive Order for certain other parcels also omitted from the same patent to be removed from the same reservation?

PARTIES

The parties to this proceeding are the Pechanga Band of Mission Indians (a federally-recognized tribe of Indians), Kacor Realty, Inc. (a California corporation), Safeco Title Insurance Co. (a California corporation), Murdy Foundation (a California corporation), John A. Murdy III, George A. Trotter, Jr., and J.A. Murdy, Jr.

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The opinion of the Court of Appeals is reported at 680 F.2d 71 and appears as Appendix B. The unreported opinion of the District Court appears as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on June 22, 1982. Petitioner filed a motion for rehearing on July 3, 1982, which was denied by the Court of Appeals on July 21, 1982. By his order of October 18, 1982, Justice Rehnquist extended the period for the filing of this petition to and including November 18, 1982.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent portions of the pivotal statute, the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712), are reproduced as footnote 3 to the opinion of the Court of Appeals, reproduced as Appendix B.

STATEMENT OF THE CASE

The Pechanga Band of Mission Indians is an impoverished federally-recognized Indian tribe. About half its members live on its 3,600-acre reservation located about 60 miles northeast of San Diego, California. The reservation is located near the Band's ancestral village site from which its members were forcibly evicted in 1875. Under the authority of the Four Reservations Act of April 8, 1864 (13 Stat. 39), under which the Mission Indian Reservation was established by various Presidential Executive Orders as a multi-tract non-contiguous reservation, along with three other reservations throughout California, President Arthur issued his Executive Order of June 27, 1882 establishing the reservation to include most of five sections of land. See *Mattz v. Arnett*, 412 U.S. 481, 494 (1973).

Because this and similar Executive Orders for other tracts proved insufficient to deter trespassing by non-Indians, Congress passed the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712). Under this statute, the President appointed a Commission whose function it was to recommend appropriate permanent reservations for the various Bands of Mission Indians to the Secretary of the Interior, who would issue formal patents to those lands declaring that the United States would hold these lands in trust for the various Bands.

The Commission recommended that all parcels included in the June 27, 1882 Executive Order be included in the patent for the Pechanga Indian Reservation and, to afford the greatest possible protection to the Pechanga Band's interest in those lands even before the patent issued, President Harrison issued an additional Executive Order on December 29, 1891 reserving those parcels from further disposition until the patent could issue. However, as to two parcels included in the 1882 and 1891 Executive Orders, it was noticed in 1893, when the Secretary was about to patent all the parcels to the Pechanga Band, that a homesteader had completed the last steps required for him to entitle him to a patent for one parcel (the homestead parcel) on September 27, 1882, which patent had been issued on June 12, 1885. Similarly, the settler had completed his duties toward a second parcel on January 5, 1882, receiving a patent for his parcel (the pre-emption parcel) on September 20, 1882. Both the homestead parcel and the pre-emption parcel were included in the Pechanga Indian Reservation by the 1882 and 1891 Executive Orders, as were two other similarly disposed of parcels not now at issue.

After investigation, it was learned that the settler had obtained both his parcels by fraud against the United States. At the request of the Secretary of the Interior, the Commissioner of Indian Affairs, and the Commissioner of the General Land Office, the Attorney General filed actions in federal circuit court to annul the fraudulent patents.

Meanwhile, it was necessary for some patent to be issued to the Pechanga Band, at least for those parts of the reservation included in the 1882 and 1891 Executive Orders as to which there were no adverse claims. Such a limited initial patent was issued on August 29, 1893 after the Commissioner of Indian Affairs on August 15, 1893 recommended:

> that the Commissioner of the General Land Office be directed to cause a patent to issue to the Temecula [Pechanga] band or village of Mission Indians for such of the tracts designated in office letter of July 28, 1893, as are found to be free from conflicts, *and to subsequently issue a similar patent for such of the remaining tracts as may hereafter become free of conflict.* [Emphasis added]

However, the contemplated second patent for the homestead and pre-emption parcels was never issued because the Attorney General had the suits dismissed with no defendant having been served in 1901 when he was informed that title to the two parcels had passed into bona fide purchasers.

Because the United States took no further steps to clear the title to these two parcels and to include them in the Pechanga Indian Reservation by the above contemplated second patent, the Pechanga Band itself filed a civil action against the present occupants of the parcels on November 28, 1978 in the U.S. District Court for the Central District of California, pursuant to 28 U.S.C. §§1331 and 1362. After striking a counterclaim and various defenses, the District Court entered summary judgment for the defendants on August 25, 1980. The Court of Appeals for the Ninth Circuit affirmed on June 22, 1982 (680 F.2d 71) on the single narrow ground that, even if the homestead and pre-emption parcels were properly part of the Pechanga Indian Reservation under the 1882 and 1891 Executive Orders, the United States acted to extinguish the Band's interest in those parcels by failing to include them in the 1893 patent. 680 F.2d 75. Because the Pechanga Band believes that its prior interest in these two rural, unimproved parcels, totaling 318 acres, survived their exclusion from the 1893 patent, the Band now seeks review of the Court of Appeals'

judgment so that judgment may be reversed and the case remanded to the Court of Appeals for a determination of the merits of the Band's claim.

REASONS FOR GRANTING THE WRIT

I.

The opinion of the Court of Appeals forecloses similar land claims by up to nineteen Indian tribes, contrary to this Court's teachings.

Under the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712) approximately nineteen separate Indian reservations were created and patented to the respective Bands. Several, in addition to the Pechanga Band, have asserted or are preparing similar land claims. If the Court of Appeals' opinion that, under the Act, "the Secretary *had* to issue a patent to the land in order to include it in the reservation" (680 F.2d at 75, emphasis added) remains unimpaired, then all these claims will be foreclosed for parcels included in the Executive Orders from the 1875-1891 period but omitted from the post-1891 patents for one reason or another.

So to foreclose such claims would be contrary to this Court's teachings in cases such as *U.S. v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1942) to the effect that a tribe's mere acceptance of a reservation does not necessarily extinguish its claim to lands outside that reservation. Furthermore, there has been a very strong Congressional interest in insuring that sufficient time will be available for all such claims to be filed before the oft-extended statute of limitations expires on December 31, 1982. See, e.g., P.L. 96-217, 94 Stat. 126, 28 U.S.C. §2415, and its legislative history, 1980 U.S.C.C. & A.N. vol. 2, pp. 206-216. Not only would foreclosing all these claims violate this policy of achieving a prompt and final resolution of all such claims on their merits, but an unknown number of other tribes which received patents under statutes other than the Mission

Indian Relief Act would hesitate to assert, if not abandon, their similar claims, thereby further frustrating the above Congressional policy.

In addition, this Court has held that an error on the part of federal officials cannot be imputed to an Indian tribe so as to defeat the tribe's claims. *Santa Fe, supra*, 314 U.S. at 360; *Cramer v. U.S.*, 261 U.S. 219, 234 (1923). The Pechanga Band asserts that the Attorney General was in error in having the actions to annul the fradulently-obtained patents for the instant parcels dismissed because title to them had passed into parties who were supposedly bona fide purchasers. So to impute the Attorney General's error to the Pechanga Band is thus contrary to *Santa Fe* and *Cramer, supra*, and would cast an obvious pall over any similar tribal claims not pursued by the United States for similar reasons.

II.

The Court of Appeals' opinion is contrary to this Court's only opinion construing the purpose of the Mission Indian Relief Act.

This Court's only opinion regarding the purpose of the Mission Indian Relief Act is *Arenas v. U.S.*, 322 U.S. 419 (1944) in which this Court stated that

> The Mission Indians had deserved well and had fared badly and Congress passed the Mission Indian Act of [January 12] 1891 for their particular redress.
> *Id.*, 322 U.S. at 421

> Eventually the country was aroused by their plight and set up a commission to investigate their grievances and to make recommendations for their protection and relief. It reported in 1884 and its recommendations were substantially embodied in the Mission Indian Act of 1891.
> *Id.*, 322 U.S. at 427-8

The Court of Appeals' opinion reads the Mission Indian Relief Act as authorizing the Secretary, by merely failing to include the homestead and pre-emption parcels in the

1893 patent, to divest the Pechanga Band of its prior interest in the two parcels under the 1882 and 1891 Executive Orders. To do so is entirely inconsistent with the purpose of the Mission Indian Relief Act for the "protection and relief" of the Mission Indians with regard to protecting their interests in land, as stated in *Arenas*. This is particularly evident from the Commissioner's above-quoted letter which sought to afford the maximum possible protection to the Pechanga Band's land interests by issuing a patent immediately for the undisputed portions of the reservation, with a second patent to follow for other parcels when title difficulties were settled.

To read the Mission Indian Relief Act so narrowly as to imply a divesture of Indian property rights from such an understandable reluctance on the part of the Secretary and Commissioner to delay issuing a patent for the entire reservation, while further encroachments could occur, merely to allow time to annul the fraudulently-obtained patents, also contravenes the "eminently sound and vital canon" of construction, *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655, n. 7 (1976), that "Ambiguities in federal law have been generously construed" in favor of Indian interests, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). To the extent that the Mission Indian Relief Act's provisions regarding allotment were ambiguous, this Court followed this rule in resolving the ambiguity in favor of the Indian interest in *Arenas*. The Court of Appeals did not do likewise in the present case, and thus has departed from *Arenas*, to the detriment of the Pechanga Band and any other Mission Indian Band which relies on *Arenas*' reading of the purpose and the resolution of ambiguities in the Mission Indian Relief Act.

III.

The Court of Appeals opinion departs from the standard of clarity of purpose set by this Court for finding a termination of reservation status.

In a modern series of cases, this Court has held that a Congressional purpose to terminate the reservation status of part of an Indian reservation "must be expressed on the face of the Act or be *clear* from the surrounding circumstances and legislative history." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 568 (1977), quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1972), emphasis added. The face of the Misison Indian Relief Act does not disclose any intention to permit the Secretary to divest the Band of its interest in the subject parcels by merely failing to include them in an initial patent, especially under the above circumstances. As *Arenas* teaches, the purpose of the Act was entirely to safeguard existing Indian property rights under the pre-1891 Executive Orders. Thus, the legislative history and surrounding circumstances of this statute come nowhere near meeting the standard of *clarity* needed to terminate reservation status. On the contrary, these sources, as noted above, display a pellucid clarity of purpose to preserve reservation status. For this reason, the Court of Appeals has deviated seriously from this Court's above standard.

The significance of this error for all other Indian land claims, both those arising under this statute and those arising under other statutes, is illustrated by the treatment accorded by the United States to *other* parcels included in Indian reservations under pre-1891 Executive Orders, but omitted from post-1891 patents. For example, by promulgating his Proclamation of May 15, 1905 (34 Stat. 602), President Roosevelt expressly restored a certain parcel to the public domain, which parcel had been included in the reservation for the Capitan Grande Band of Mission Indians as previously established by the Executive Order of December 27, 1875 and the very same Executive Order of

December 29, 1891 affecting the subject parcels noted above. Why did the President have to make such an express revocation of the previous Executive Order if the mere exclusion of the parcel from the patent would have been sufficient, as the Court of Appeals has held? Why did President Cleveland issue his Executive Order of January 25, 1886 to remove a certain parcel from the Pechanga Indian Reservation, as established by the Executive Order of June 27, 1882, if such an express act was unnecessary?

The only answer to these questions is that the mere inadvertance of the Secretary under the Mission Indian Relief Act cannot operate to revoke the reservation status of a parcel included in a reservation under a previous Executive Order. Another Executive Order or Proclamation is needed, not just the Secretary's failure to include the parcel in a patent. This conclusion is really the teaching of this Court in *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975), *Mattz v. Arnett*, 412 U.S. 481, 504-5 (1973) and *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962) that "... when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *U.S. v. Celestine*, 215 U.S. 278, 285 (1909). In short, to terminate reservation status, it is necessary to show an act of equal stature and dignity to the act which gave reservation status.

No such act of equal stature or dignity, such as the Proclamation of May 15, 1905, was present here. Even though the Secretary may have wide discretion under the Mission Indian Relief Act, he did not have the power, by the mere inadvertance of intending to delay issuance of a patent for the subject parcels until their titles were clear, to terminate reservation status. To set forth this rule in the context of the Secretary's actions under a statute, rather than only in the context of Congress' own intention through statutes, as in *Rosebud*, *DeCoteau*, *Mattz*, and *Seymour*, would afford guidance to all courts faced with this as-yet unanswered question, and would eliminate those cases, as

here, where the clarity of purpose to disestablish, as enunciated in *Rosebud*, *DeCoteau*, and *Mattz*, *supra*, was not thought necessary merely because the action was the Secretary acting under a statute rather than Congress acting itself. This Court has not yet had occasion to consider whether this standard of clarity, as developed in these cases from the *Celestine* principle, extends to this context, and the question should now be addressed.

CONCLUSION

For the above reasons, the Pechanga Band of Mission Indians urges the Court to grant the petition to address these important unanswered questions of federal Indian law, and to review the Court of Appeals' erroneous interpretation of *Arenas* and the other cases noted above.

November 18, 1982 Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE PECHANGA BAND OF MISSION INDIANS,

Plaintiff,

v.

KACOR REALTY, INC., etc., et al,

Defendants.

No. CV-78-4499-MML

MEMORANDUM

Defendants' motion for summary judgment came on for hearing before the Honorable Malcolm M. Lucas, United States District Judge on June 16, 1980. After thoroughly considering the papers filed in this action and the arguments advanced at the hearing, the Court finds that no genuine issue of material fact exists and that defendants are entitled to judgment as a matter of law. Accordingly, the Court is entering, concomitantly with this Memorandum, a Judgment in favor of defendants and against plaintiff.

Although under F.R.C.P. 52(a) findings of fact and conlusions of law are unnecessary on decisions under Rule 56, it is helpful to the parties and to a reviewing Court if the trial court sets out those facts it finds are not disputed and the conclusions of law upon which the Court's decision rests. Particularly are such elucidations of value where, as here, either the factual setting or the legal principles are complex or where the record as a whole is voluminous. The

Court recognizes that the facts set forth cannot be "found" in the sense that they are the product of the Court's resolution of issues disputed by the parties. Rather, they are simply statements of the facts the Court finds to be material and as to which the Court determines that there is no genuine issue. *See, Garter-Bare Co. v. Munsingwear, Inc.*, _____ F.2d _____, (No. 75-3826) (9th Cir., April 17, 1980) *(especially*, Wallace, J., concurring).

In this action, the material facts are readily admitted by both sides. The parties differ as to only one factual area and, for the purposes of this motion only, defendants concede that plaintiff's position is correct.

In 1864, Congress enacted the Four Reservations Act (13 Stat. 39) permitting the President to designate reservation land for four California Indian tribes including the Mission Indians. Subsequent to this Act, several designations of land for Mission Indians were made.

On January 5, 1882, a Certificate of Entry was issued by the Land Office to Peter Mouren for a parcel of land involved in this litigation known as the preemption parcel. About two weeks later, on January 23, 1882, the Land Office recorded an entry by Mouren on the second parcel involved in this litigation, the homestead parcel. The homestead and preemption parcels are contiguous. It is alleged by plaintiff that on January 24, 1882 Mouren transferred his interests in both parcels to one Louis Wolf. It is admitted by both parties that such a transfer would invalidate any claim Mouren had to the parcels under the homestead or preemption laws and would be a fraud on the government. Defendants admit these facts for the purposes of this motion only.

President Arthur issued an Executive Order on June 27, 1882, under the authority of the 1864 Act of Congress, that added a large area of land to the Mission Indian reservation. The boundaries of this grant included both the homestead and preemption parcels. The Executive Order stated that all lands within the designated boundaries were to be reservation lands, "PROVIDED, HOWEVER, That

any tract or tracts the title to which has passed out of the United States, or to which valid, legal rights have attached under existing laws of the United States providing for the disposition of the public domain, are hereby excluded from the reservation hereby created."

The Land Office issued a patent on the preemption parcel to Mouren on September 20, 1882. Mouren commuted his homestead entry on September 27, 1882 and received a patent to the land on June 12, 1885.

Congress enacted the Mission Indians Relief Act (26 Stat. 712) on January 12, 1891. The Act provided for the reexamination of the existing Mission Indian reservation lands and for the patenting of lands to the tribes based upon the Indians' actual possession of land and their need for such land. On August 29, 1893, on the basis of a commission study made under the 1891 Act, a Trust Patent was issued to the Mission Indians for reservation lands. This patent included most of the land reserved under the 1882 Executive Order but did not include either the preemption or homestead parcel. In addition, two other small parcels of the 1882 grant were not included but two small additions (one non-contiguous) of land were made.

In 1894 the United States filed bills in equity in the Circuit Court for the Southern District of California alleging that the patents to the homestead and preemption parcels had been obtained by fraud and praying that the Court declare the patents invalid and that the lands be restored to the public domain. Service of process was never effected in either suit and in 1901 the United States voluntarily dismissed the bills.

Plaintiff, the Indian tribe holding under the 1882 grant and 1893 trust patent, brings suit against defendants, the successors in interest to the original patentee, seeking title to the preemption and homestead parcels. It is not disputed that defendants' title is traceable to Mouren nor that plaintiff has not occupied the disputed parcels at least since 1882. In resolving this action on the facts as presented, three substantive areas of dispute are presented. First, the

status of the parcels at the time of the 1882 Executive Order. Second, the effect, if any, of Mouren's fraud in procuring title to the parcels. Finally, the effect, if any, of actions subsequent to the 1882 Executive Order, notably the 1891 suits and the 1893 trust patent. Additionally, plaintiff raises an issue under 25 U.S.C. §194 that challenges the properiety of summary judgment in this action. That argument may be dealt with summarily.

25 U.S.C. §194, originally enacted in 1834, provides that, in land cases involving Indians and whites, the burden of proof shall be on the white where the Indian establishes a prima facie title through previous possession or ownership. Plaintiff contends that this section precludes summary judgment. The Court holds, however, that §194 merely establishes a burden of proof through a rebuttal presumption. If no genuine issue of material fact exists, summary judgment may be entered where one party shows it is entitled to judgment as a matter of law. In short, §194 cannot prevent an otherwise proper entry of summary judgment.

Turning to the first issue of substance, the status of the parcels at the time of the 1882 Executive Order, the Court finds, and the parties agree, that, under the Executive Order language quoted above, the lands became part of the Indian reservation unless prior to the Executive Order they had been removed from the public domain such that the President had no power to dispose of them through the Executive Order. Both parties also agree, and the Court so finds, that steps taken prior to issuance of a patent could suffice to remove lands from disposition under the Executive Order. Plaintiff asserts that only by taking the last act necessary for issuance of a patent can the lands be removed from the disposition under the Executive Order. Defendants allege that "entry" is sufficient to remove the lands. Defendants admit that entry occurs at different points in the settlement and patenting process for lands obtained under the preemption laws and for those under the homestead laws.

The Court finds that entry is the point at which property interests attach to lands under both the preemption and homestead laws sufficient to remove lands from disposition from the public domain. *See*, 17 Op. Atty. Gen. 160 (1881). Plaintiff's position that entry establishes rights against third parties but not against the power of the United States to dispose of the public domain does not find support in the case law. *See*, e.g. *Hastings & Dakota R.R. v. Whitney*, 132 U.S. 357 (1889). The parties agree and the Court finds that, as to the preemption parcel, Mouren's rights had so attached at the time of the 1882 Executive Order that the Order did not transfer the preemption parcel to the Indian reservation. Under plaintiff's theory, Mouren had taken the last act necessary for issuance of a patent as to the preemption parcel prior to the Executive Order. Under defendants' theory, and the law as the Court finds it, Mouren had received a Certificate of Entry from the Land Office prior to the Executive Order. *See*, Exhibit 1 to Appendix I, entry dated January 5, 1882. As to the homestead parcel, the Court finds that entry occurred prior to the Executive Order and therefore that Mouren's rights in that parcel had attached such that the Executive Order did not transfer that parcel to the Indian reservation.

Under the homestead laws, entry was effected by making a proper application with the land office, filing the appropriate affidavit of intent, paying certain required fees, and paying certain commissions. *See*, 17 Op. Atty. Gen. 161 (1881); *Hastings & Dakota R.R. v. Whitney, supra*. It is not disputed by the parties that Mouren complied with the above requirements prior to the issuance of the Executive Order. *See*, Exhibit 2, Appendix I. Plaintiff alleges that Mouren's failure to file an affidavit of good faith, the affidavits of two witnesses, make final proofs, file an affidavit of publication, file a declaration of intent to become a citizen, file a certificate re posting of notice, and receive a receipt for the payment of the final fees prevented his rights from attaching to the homestead parcel and that therefore the land passed to the reservation under the 1882 Executive Order. The Court, as noted above, has held that

entry is sufficient to remove the lands from disposition and that entry as to the homestead parcel occurred.

The Land Office homestead application (Exhibit 2, Appendix I) itself supports the finding that entry was made on the homestead parcel at the time the application was made, affidavit filed, and certain preliminary fees paid. The cases are settled that an entry recorded by the Land Office is sufficient to remove the land from other disposition from the public domain, *even* where the entry is invalid on its face. *Hastings & Dakota R.R. v. Whitney, supra,* at 363-364. The Court finds that, in this case, the entry on each parcel appears valid on its face. This alone would be sufficient for the Court to find that, at the time of the Executive Order, the parcels had been removed from the public domain such that the Order did not transfer the parcels to the Indian reservation.

In sum, the Court finds that, on June 27, 1882, the date of the Executive Order, both the preemption parcel and the homestead parcel had been removed from disposition such that the Order did not transfer those lands to the Indian reservation.

The second major issue is the effect, if any, of Mouren's fraud in obtaining the patents to the parcels. For the purposes of this motion defendants do not contest the allegation that such fraud was committed against the Land Office. Plaintiff argues that the fraud rendered the patents void because the Executive Order removed the land from the public domain and made it an Indian reservation prior to the issuance of the patent. Defendants agree that, where land has been previously removed from the public domain, a subsequent patent is void. However, defendants argue that where the land is patented from the public domain by fraud, the patent is voidable rather than void. The Court finds that defendants' position is correct. That is, that Mouren's fraud rendered the patents voidable rather than void. *Burke v. Southern Pacific R.R. Co.*, 234 U.S. 669 (1914).

As a subsidiary issue, defendants argue that should the patents be declared void, the lands would revert to the public domain rather than automatically becoming part of the Indian reservation. The Court finds that this position is correct; the statutory language of the Executive Order removes from the Indian reservation for all time any lands that were not included in 1882. Therefore, a subsequent voiding of the patents would restore the lands to the public domain to be disposed of as Congress sees fit. *Arnold v. Morton*, 529 F.2d 1101 (9th Cir. 1976). Accordingly, the Court finds that plaintiff cannot recover the lands in question through this suit and therefore has no standing to litigate what, in essence, is a possible claim by the United States against defendants to cancel the patents.

As the Court has held above, the entry on both parcels removed them from the public domain before the 1882 Executive Order, even where that entry was fraudulent. Under the language of the Order, the lands would revert to the public domain should the patents be cancelled. As well, the Court has held that a fraudulently obtained patent is, in those circumstances, voidable rather than void. Therefore, the Court finds that the effect of the fraud on the Land Office is to render the patents voidable by the United States but otherwise valid. Plaintiff can receive no benefit from any fraud perpetrated by Mouren on the Land Office.

Defendants submit that, in any event, they are bona fide purchasers of the land for value and without notice of any fraud [.] Plaintiff submits that the terms of the 1882 Executive Order constitute constructive notice and that in any event defendants should have been put on inquiry notice by those terms. Thus, plaintiff argues that defendants are not bona fide purchasers. In addition, plaintiff submits that the bona fide purchaser doctrine serves only to clear an otherwise valid legal title but cannot be used to validate a legally invalid title.

The Court finds that the terms of the Executive Order do not put defendants on constructive or inquiry notice of possible defects in their title. An examination of the Ex-

ecutive Order and an examination of the chain of title would reveal that the land was patented from the Land Office and, under the 1893 trust patent, excluded from the Indian reservation. Accordingly, the Court finds that defendants are bona fide purchasers of the parcels who took for value and without notice of any claims by plaintiff. Thus, any equitable clouds upon defendants' legal title would be cleared by application of the bona fide purchaser doctrine.

As a final area of conflict, defendants argue that whatever rights were accorded to plaintiff under the 1882 Executive Order were disestablished by subsequent events. Specifically, defendants argue that the 1893 trust patent, by granting land rights to the Indian tribe, extinguished any rights in the lands under the 1882 Executive Order. As well, defendants argue that the dismissal in 1901 of the 1894 suits in equity acted as a confirmation of the patents by the United States. Plaintiff argues that the 1893 trust patent did not disestablish the rights to the 1882 lands and submits that the 1864 Four Reservations Act imbued plaintiff with rights that cannot be extinguished without compensation under the Fifth Amendment.

The Court finds that the lands reserved under the 1882 Executive Order were subject to change at the discretion of the President and that the boundaries of that reservation could be changed without approval of the plaintiff. *Donnelly v. United States*, 228 U.S. 243 and 703 (1903); *Mattz v. Arnett*, 412 U.S. 481 (1973) at 493-494, n.15. Accordingly, the Court finds that the actions of the United States in issuing the 1893 trust patent without including the parcels in question was valid and completely extinguished any inchoate rights plaintiff had in those parcels. In any event, plaintiff's recourse for any taking that may have occurred must lie against the United States under the compensation clause of the Fifth Amendment and not against defendants. Accordingly, then, the Court finds that the 1893 trust patent disestablished any claims plaintiff had to the parcels involved in this action.

As to the equity suits, the Court finds that the doctrine of collateral estoppel might be applicable were the United States to bring suit to cancel the patents. In such an event, the dismissal in 1901 might act as a bar to recovery by the United States. In this litigation, however, the Court finds that the only significance of the 1894 suit and 1901 dismissal is to indicate that the United States recognized that patents had issued. Those suits can have no bearing on the rights of the litigants here *inter sese*.

The Court finds that defendants are the successors in interest to the original patentee of the homestead and preemption parcels; that those parcels were not included in the Indian reservation under the 1882 Executive Order; that the patents, although possibly voidable by the United States, are valid as against third parties; and that any rights plaintiff may have possessed in those parcels were extinguished by the 1893 trust patent. Accordingly, the Court finds that no genuine issue of material fact exists and that defendants are entitled to judgment as a matter of law.

Dated: August 22, 1980

Malcolm M. Lucas
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PECHANGA BAND OF MISSION INDIANS
Plaintiff-Appellant,

v.

KACOR REALTY, INC., et at.,
Defendants-Appellees.

No. 80-5755
DC No. 78-4499-MML

OPINION

Appeal from the United States District Court
for the Central District of California
Malcolm M. Lucas, District Judge, Presiding
Argued and Submitted January 8, 1982

BEFORE: CHOY, KENNEDY and FARRIS, Circuit Judges.

CHOY, Circuit Judge:

The Pechanga Band of Mission Indians claims that its reservation includes 320 acres of undeveloped land in Riverside County, California, to which the defendants hold title. The district court entered summary judgment against the Band on three independent grounds. We need reach only the ground that the Government did not grant the land to the Band in order to affirm the district court's judgment.

I. History

Ownership of the land turns on events from the late 19th century. Peter Mouren, the defendants' precedessor-in-interest, obtained a patent to some of the land in 1882 and a second patent to the remainder in 1885. Due to suspected fraud by Mouren, the Government brought two lawsuits in 1894 to set aside the patents. It dropped the suits in mid-1901 prior to any decision on the merits.

The Pechanga Band derives whatever interest it may have in the land from the reservations established pursuant to two acts of Congress. In 1864, Congress empowered the President to set apart land in California "to be retained by the United States for the purposes of Indian reservations." The Four Reservations Act § 2, ch. 48, 13 Stat. 39, 40. Under the 1864 Act, the President could change the reservation sites almost at will. *See Mattz v. Arnett*, 412 U.S. 481, 494 n.15 (1973); *Donnelly v. United States*, 228 U.S. 243, 256-57 (1913). Through a series of Executive Orders over the two decades after the passage of the Act, a reservation for the Pechanga Band was established, disestablished, re-established and reshaped. *See* 1 C. Kappler, *Indian Affairs, Law, and Treaties* 819-24 (1904) (reproducing the orders).[1] One of the orders is especially important to this appeal. On June 27, 1882, President Arthur established a site for the Band's reservation which seems to have included the land presently at issue.[2]

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[1] In general, reservations created by Executive Order were temporary, *see* Sioux Tribe v. United States, 316 U.S. 317, 327-28 (1942); United States v. Southern Pacific Transportation Co., 543 F.2d 676, 687 (9th Cir. 1976); and their boundaries changed frequently, *see* Mattez v. Arnett, 412 U.S. 481, 493-94 n.15 (1973).

[2] A difficult issue that we need not resolve is whether the 1882 reservation actually included the land at issue. The Executive Order provided:

> That any tract or tracts the title to which has passed out of the United States, or to which valid, legal rights have attached under existing laws of the United States providing for the disposition of the public domain, are hereby excluded from the reservation hereby created.

Prior to the Order, Mouren had received a patent to some of the land and had taken all the steps needed to become entitled to a patent to the remainder. We reserve judgment on the whether the proviso would have excluded either parcel from the reservation.

Because the constantly-changing reservation sites under the 1864 Act proved unsatisfactory, Congress enacted the Mission Indians Relief Act, ch. 65, 26 Stat. 712 (1891). *See Arenas v. United States*, 322 U.S. 419, 421 (1944). The 1891 Act empowered the Secretary of the Interior to oversee the establishment of new, more secure reservations.[3] The

[3] The sections of the 1891 Act governing the creation of reservations stated:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.
>
> Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior. They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by said commissioners subject in each case to the approval of the Secretary of the Interior. In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed. And the said commission is hereby authorized to employ a competent surveyor and the necessary assistant.
>
> Sec. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said

first step in the process was for him to appoint commissioners to propose reservation sites. Their selection became "valid when approved by the President and the Secretary of the Interior." The Act instructed the Secretary that "if no valid objection exists, [he] shall cause a patent to issue for each of the reservations selected by the commission." An explicit constraint on this consummating act was that "no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain."

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period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided*, That no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time thereafter. Any such person shall be permitted to exercise the same right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent, in similar form, may be issued for any tract or tracts at any time after the appraised value of the improvements thereon shall have been paid: *And provided further*, That in case any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine: *And provided further*, That said patents declaring such lands to be held in trust as aforesaid shall be retained and kept in the Interior Department, and certified copies of the same shall be forwarded to and kept at the agency by the agent having charge of the Indians for whom such lands are to be held in trust, and said copies shall be open to inspection at such agency.

The Pechanga Band's present reservation was established pursuant to the 1891 Act. The commissioners' proposal included the land at issue, and President Harrison directed that the proposed site be set aside until a patent could be issued. The Secretary of the Interior, however, decided to issue a patent only to the uncontested parcels and await a judicial determination on whether Mouren had a valid right to the land at issue. Because the Government dropped its suits against Mouren prior to any decision on the merits, the Secretary never issued a patent to the Band for the land at issue. The Secretary thus did not take the final step required under the Act to include the land in the reservation.

II. The Pechanga Band's Arguments

The Pechanga Band makes two arguments why we should find that it has a legal interest in the land despite the Secretary's decision not to include it in the patent establishing the Band's reservation: (1) the Secretary lacked authority to remove land from the reservation established by the 1882 Executive Order, and (2) the actions taken by him pursuant to the 1891 Act effectively conveyed the land at issue to the Band. We find neither argument persuasive.

A. The Secretary's Authority

The Mission Indians Relief Act of 1891 worked to extinguish whatever interest the Band had in the land pursuant to the 1882 Executive Order. A primary purpose of the 1891 Act was to replace the old, constantly-changing reservations with new, more secure ones. Although the new reservations were to "include, as far as practicable, the lands and villages which have been in actual occupation and possession of said Indians," inclusion of the prior sites was not mandated.

The Pechanga Band asserts, however, that the 1882 Order was a presidential act that could not be reversed by the Secretary of the Interior. In support of this assertion, it cites *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 118 (9th

Cir. 1980), *United States v. Southern Pacific Transportation Co.*, 601 F.2d 1059, 1064 (9th Cir. 1979), and *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 689 (9th Cir. 1976). Because the officials in those cases were not empowered to convey the land there at issue, we held that their actions had no effect. But in this case, Congress authorized the Secretary to decide what land to include in the Pechanga Band's new reservation. The Band does not contend that Congress lacked power to extinguish whatever rights were created by the 1882 Order, or that Congress could not convey that power to the Secretary.

B. The Secretary's Actions

Despite the Secretary's decision not to include the land in the patent, the Pechanga Band urges us to consider the Secretary's apparent desire to enlarge the reservation. The Band has not, however, supplied us any reason to look past the Secretary's unambiguous actions. Both opinions cited by the Band discussed intent only because the actions taken by the official did not purport to modify the reservation site. *Sekaquaptewa v. MacDonald*, 626 F.2d at 118; *United States v. Southern Pacific Transportation Co.*, 543 F.2d at 690. In this case, the Secretary had to issue a patent to the land in order to include it in the reservation. The record is unambiguous that he purposefully elected not to take this final step. We therefore cannot speculate whether the Secretary would have preferred in the abstract to grant the land to the Pechanga Band.

III. Conclusion

Indians have a special relationship with the federal government and are entitled to special protection. *See Red Fox v. Red Fox*, 564 F.2d 361, 365 (9th Cir. 1977). However, we cannot avoid the conclusions that the patent establishing the Pechanga Band's reservation did not include the land at issue, and that we cannot independently grant the land to the Band.

AFFIRMED.

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOTE:

Apparently the Court of Appeals has not prepared a separate document as its judgment in this case. However, it did send to petitioner's counsel of record, along with a copy of its opinion which was filed on June 22, 1982, a document entitled "Notice of Entry of Judgment" which states that "Judgment was entered in this case as of the file stamp date on the attached decision of the court."

If the petition is granted, or if the Court should so desire, counsel for petitioner will obtain such a separate document embodying the judgment of the Court of Appeals, if such a separate document exists or can be prepared.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PECHANGA BAND OF MISSION INDIANS,

Plaintiff-Appellant,

v.

KACOR REALTY, INC., etc., et al.,

Defendants-Appellees

No. 80-5755

ORDER

Before: CHOY, KENNEDY and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

Dated: July 3, 1982

Office-Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-854

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

THE PECHANGA BAND OF MISSION INDIANS,
Petitioner,
v.
KACOR REALTY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS-DEFENDANTS IN OPPOSITION

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December 23, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a reservation established by trust patent issued pursuant to the Mission Indian Relief Act of 1891 necessarily included all land within a prior executive order reservation granted by authorization of the Four Reservations Act of 1864.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-854

THE PECHANGA BAND OF MISSION INDIANS,
Petitioner,

v.

KACOR REALTY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENTS-DEFENDANTS IN OPPOSITION

Respondents Kacor Realty, Inc., Murdy Foundation, Security Title Insurance Company, John A. Murdy III, George A. Trotter, Jr., and J.A. Murdy, Jr., submit this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed by petitioner, the Pechanga Band of Mission Indians.[1]

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[1] Since the rendering of the Ninth Circuit's opinion, respondent Kacor Realty, Inc. has changed its name to Kacor Development Company. The parents and affiliates of Kacor Development Company include Kaiser Aluminum & Chemical Corp., Westward Properties, Inc., Kaiser Hawaii Kai Development Co., and Kaiser Telepromter of Hawaii, Inc. The parent of respondent Security Title Insurance Company is Safeco Title Insurance Company, a wholly-owned subsidiary of Safeco Corporation.

OPINIONS BELOW AND JURISDICTION

Respondents do not disagree with petitioner's statements under the above headings.

STATUTES INVOLVED

Section 2 of the Four Reservations Act of 1864, Ch. 48, 13 Stat. 39 (1864), states in relevant part:

> [T]here shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of [California], to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended . . . .

Relevant portions of the Mission Indian Relief Act of 1891, Ch. 65, 26 Stat. 712 (1891), are set out in the Appendix to this Brief.

STATEMENT OF THE CASE

The respondents, defendants below, are the present owners of approximately three hundred twenty acres of valuable undeveloped land located southeast of the town of Temecula, in the Rancho California area of Riverside County, California (hereinafter "land at issue"). It is without dispute that respondents' interest in the land at issue is founded upon an unbroken chain of title from two nineteenth-century patents issued by the United States to a settler pursuant to the homestead and preemption laws. The petitioner, Pechanga Band of Mission Indians, asserts herein that it enjoys a beneficial interest in the land at issue by virtue of an 1882 executive order and that it is entitled to almost one hundred years of trespass damages. It is acknowledged that petitioner has never

occupied or possessed this land at any time since the adte of that executive order.

The Mission Indian Reservation was originally established in southern California pursuant to the Four Reservations Act of 1864 which authorized the setting aside of public lands for such purposes by executive order.[2] This reservation did not consist of a single contiguous tract but instead was composed of numerous noncontiguous tracts located in three counties. Over a number of years and a series of Presidents, various executive orders added lands to the Mission Indian Reservation, took lands away, and even terminated entire reservations.[3]

On June 27, 1882 President Chester A. Arthur signed an executive order pursuant to the authority of the Four Reservations Act which reserved certain described lands in the Temecula area "for Indian purposes."[4] The land

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[2] Act to Provide for the better Organization of Indian Affairs in California (Four Reservations Act), Ch. 48, 13 Stat. 39 (1864).

[3] This process of alteration was described by the Court in an analysis of the Four Reservations Act:

> [I]t is noteworthy that the boundaries of the Mission Reservation were altered repeatedly between 1870 and 1875, and even thereafter. These actions were taken under the President's continuing authority to set apart and add to or diminish the four reservations authorized under the 1864 Act.

Mattz v. Arnett, 412 U.S. 481, 493-94, n.15 (1973). *See also*, Donnelly v. United States, 228 U.S. 243, 256-57 (1913); Crichton v. Shelton, 33 Pub. Lands Dec. 205, 209-10 (1904).

[4] Exec. Order of June 27, 1882, 1 Executive Orders Relating to Indian Reservations from May 14, 1855 to July 1, 1912 at 822-23 (Gov't Printing Office 1912). The full text of the executive order is as follows:

> EXECUTIVE MANSION, *June 27, 1882.* It is hereby ordered that the following-described lands, situated and lying in the State of California, viz, sections numbered 26, 27, 28, 34, and 35, in township numbered 8 south, of range numbered 2 west, of the San Bernardino meridian, be, and the same hereby are, withdrawn from sale and settlement, and set apart for Indian

at issue was contained within the legal description of that executive order. However, that same order contained an exclusion for land as to which title had already passed from the United States and land as to which "valid, legal rights" had attached under existing laws providing for the disposition of the public domain. Respondents' interests in the land at issue stem from two patents issued to an immigrant pursuant to the provisions of the homestead and preemption laws. The settler perfected his rights to the land by a process initiated by him prior to the 1882 executive order, although the patents were issued after the order.

In 1891 the Mission Indian Relief Act[5] was passed by Congress to give the Mission Indians of California reservations of greater permanence and certainty than the *ad hoc* reservations previously created by executive orders. The Act empowered the Secretary of the Interior to oversee the establishment of these new reservations. The first step in the process was for him to appoint commissioners to propose reservation sites.[6] Their selection was to become "valid when approved by the President and Secretary of the Interior."[7] The Act instructed the Secretary that "if no valid objection exists, [he] shall cause a patent to issue for each of the reservations selected by the commission."[8] However, an express constraint on his authority was that "no patent shall embrace any tract or tracts to which

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purposes: *Provided, however,* That any tract or tracts the title to which has passed out of the United States, or to which valid, legal rights have attached under existing laws of the United States providing for the disposition of the public domain, are hereby excluded from the reservation hereby created.

CHESTER A. ARTHUR

[5] An Act for the Relief of the Mission Indians in the State of California (Mission Indian Relief Act), Ch. 65, 26 Stat. 712 (1891).

[6] *Id.*, § 2.

[7] *Id.*

[8] *Id.*, § 3.

existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain."[9]

Pursuant to the 1891 Act, a trust patent signed by President Cleveland was issued to the petitioner at the direction of the Secretary of the Interior on August 29, 1893. The patent included certain portions of the land encompassed by the 1882 executive order but it did not include any portion of the land at issue nor two adjacent tracts. Although from time to time the United States has added to petitioner's reservation lands by further trust patents, none of those has included the disputed land.

The decision to exclude the land at issue from the 1893 trust patent to petitioner was deliberate. Prior to issuance of the patent in 1893, the Commissioner of the General Land Office informed the Secretary of the Interior that public land entries had been allowed on the land at issue and the two adjacent tracts. This information was transmitted to the Commissioner of Indian Affairs, who subsequently advised the Secretary of the Interior that the 1891 Act required that such lands be excluded from the trust patent reservation for petitioner unless the owners of such lands consented to release their interest and the government compensated them.

In 1894, on the basis of allegations by an Indian agent employed by the Bureau of Indian Affairs, the United States instituted two actions to have the settler's patents set aside, asserting that they had been obtained by fraud. In 1901, the United States Attorney General, with the concurrence of the Secretary of the Interior, the Commissioner of Indian Affairs, and the United States Attorney for Southern California, determined to dismiss these two actions because they concluded that the land at issue had long before passed into the hands of *bona fide* purchasers.

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[9] *Id. See also*, Pechanga Band v. Kacor Realty, Inc., 680 F.2d 71, 74 (9th Cir. 1982).

The Ninth Circuit Court of Appeals affirmed the district court's dismissal of the claim because "the Pechanga Band's reservation did not include the land at issue, and . . . we cannot independently grant the land to the Band." [10] This conclusion was based upon the determination that the petitioner's reservation was established by the Mission Indian Relief Act of 1891 and, acting pursuant to that Act, the Secretary of the Interior never included the land at issue in that reservation. In effect, his decision "worked to extinguish whatever interest the Band had in the land [at issue] pursuant to the 1882 Executive Order." [11]

REASONS FOR DENYING THE WRIT

The Court of Appeals and District Court Properly Concluded That the Mission Indian Relief Act of 1891 Created New Reservations and Thereby Extinguished Any Interest the Band May Have Acquired Under the 1882 Executive Order.

The Ninth Circuit Court of Appeals held that the "Missions Indian Relief Act of 1891 worked to extinguish whatever interest the Band had in the land pursuant to the 1882 Executive Order." [12] In so holding, the court determined that the 1891 Act conferred authority on the Secretary of the Interior to exclude from the new reservation land which was contained within an earlier executive order reservation. The Ninth Circuit held that there was

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[10] Pechanga Band v. Kacor Realty, Inc., 680 F.2d at 75.

[11] *Id.* at 74. In view of its ruling on the effect of the 1891 Act, the Ninth Circuit did not consider whether the 1882 executive order reservation ever included the land at issue because of the exclusionary language in the order and the activities of the settler prior to the date of the order. 680 F.2d at 73 n.2. The Ninth Circuit also did not consider whether the respondents were such *bona fide* purchasers as to preclude petitioner's claim. Each of these separate, alternative grounds constituted additional reasons for the dismissal of this case by the district court. *See* Pechanga Band v. Kacor Realty, Inc., No. CV-78-4499-MML (C.D. Ca. Aug. 22, 1980) (Petition, Appendix A, at 15-17).

[12] Pechanga Band v. Kacor Realty, Inc., 680 F.2d at 74.

no reason to look behind the Secretary's purposeful and unambiguous decision not to include the land at issue in the trust patent issued pursuant to the 1891 Act. These conclusions are fully consistent with the express language and purpose of the 1891 Act, do not conflict with previous decisions of the Court and conform with well-established standards of statutory interpretation applied by the Court in Indian law cases.

A. *The Mission Indian Relief Act of 1891 Was Intended by Congress to Establish Permanent Reservations for the Mission Indians Without Necessarily Including All Land Contained Within Earlier Executive Order Reservations.*

As noted above, the Mission Indian Relief Act of 1891 was passed by Congress to replace the hodge-podge system of constantly altered, ill-defined executive order reservations created under the Four Reservations Act of 1864. The means by which the existing executive order reservations could be replaced by more permanent and clearly identified trust patent reservations was subject to serious congressional and executive consideration.[13] After several years of debate and delay the Mission Indian Relief Act was finally adopted on January 12, 1891.[14]

The stated purpose of this Act was "to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided." [15] The first

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[13] *See, e.g.*, Sen. Exec. Doc. No. 19, 48th Cong., 1st Sess. 4-5 (1884) (Message of President Transmitting Draft Legislation for Mission Indian Relief Act).

[14] Mission Indian Relief Act, Ch. 65, 26 Stat. 712 (1891).

[15] *Id.* §1. *See also* the instructions by the Commissioner of Indian Affairs to the commission created to implement the 1891 Act:

> The object of the Act of January 12, 1891, is to secure the determination and adjustment of the rights of the Mission

step in fulfilling such a purpose was the appointment of a commission "to select a reservation for each band or village of the Mission Indians . . . which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements . . . ." [16] However, that selection was not final under the Act which went on to provide that such a selection "shall be valid when approved by the President and Secretary of the Interior." [17] In this respect, the Secretary, "if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation . . . ." [18] Moreover, his authority to allow for the issuance of a patent was limited by the provision that "no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain" unless compensation is paid.[19]

It is significant that the 1891 Act directed that the lands to be patented to the Mission Indians as their permanent reservations were to be chosen without necessarily conforming to the boundaries of any previously created executive order reservations. Instead, the Indians were to obtain a new and permanent interest "as far as practicable" in the lands which they actually occupied,

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Indians as regards their lands, and also of the rights and claims of settlers in conflict therewith.

Letter of T. J. Morgan, Commissioner of Indian Affairs, to Members of Mission Indian Commission (January 31, 1891).

[16] Mission Indian Relief Act § 2, Ch. 65, 26 Stat. 712 (1891).

[17] *Id.*

[18] *Id.* § 3.

[19] *Id.*

possessed and needed.[20] This was true even if it required the exclusion of land that was previously included in an executive order reservation:

> The object of the commission is to ascertain exactly what lands the Indians do occupy and need, what they do not occupy or need, and to include the former, as far as possible, in reservations, and to exclude the latter from the reservation as selected and defined by you. You therefore have ample authority to effect the change suggested . . . that is, to give up lands within the reservation not occupied or needed by the Indians in order to secure within the reservation, free from incumbrance [sic], lands which are needed for the Indians.[21]

Petitioner asserts that "the purpose of the [1891] Act was entirely to safeguard existing Indian property rights under the pre-1891 Executive Orders." [22] However, a reading of the terms of the Act and these contemporaneous interpretations by officials charged with authority for implementing the Act,[23] establishes without question that it was under the authority of the 1891 Act alone that a final reservation was to be established for the Pechanga Band. There was clear statutory direction from Congress to the Secretary of the Interior to establish *de novo* a permanent reservation for these Indians. While the previously existing executive order reservation created under the now superseded 1864 Act could provide

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[20] Petitioner has acknowledged that it has not occupied or possessed the disputed land since June 27, 1882 and therefore obviously was not "in the actual occupation and possession" of this land at the time of the enactment of the 1891 Mission Indian Relief Act.

[21] Letter of R. V. Belt, Acting Commissioner of Indian Affairs, to Members of the Mission Indian Commission (April 1, 1891).

[22] Petition at 7.

[23] The Court has consistently held that deference should be given to the construction of statutes reached by the agents charged by Congress with implementing such laws. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). This is particularly true

some guidance for the Secretary in the ultimate choice of the location of the trust patent reservation, those previous grants were no longer of legal consequence. The 1891 Act was by design a departure from past unsuccessful policies and an attempt to begin anew in finding reservations for the Mission Indians. As a result, although petitioner speaks of the Secretary's determination as a "divestiture" of its prior interest,[24] in fact it was simply a determination not to include all of the land previously within earlier executive orders in the permanent reservation. That later determination was clearly contemplated and authorized by the 1891 Act.

Petitioner has not contended in this Court or below that Congress was without power to replace the executive interests created under the 1864 Act with the new reservations established under the 1891 Act. Indeed, it is well established that executive order reservations, including those created pursuant to the Four Reservations Act,[25] were of a limited, indefinite and fragile nature, subject to extinguishment or modification at any time.[26] Moreover, it is a fundamental principle that Congress has the ability

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when it involves "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion . . . ." Udall v. Tallman, 380 U.S. 1, 16 (1965) *quoting* Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 408 (1961). *See also*, Russ v. Wilkins, 624 F.2d 914, 922-23 (9th Cir. 1980), *cert. denied*, 451 U.S. 908 (1981) (Act of 1890 reducing size of Round Valley Indian Reservation).

[24] Petition at 6.

[25] Mattz v. Arnett, 412 U.S. 481, 493-94 n.15 (1973); Donnelly v. United States, 228 U.S. 243, 258 (1913).

[26] *See, e.g.*, Sioux Tribe v. United States, 316 U.S. 317, 327-28 (1942) (Indians on executive order lands are "mere tenants at will, and possess no permanent rights to the lands upon which they are temporarily permitted to remain"); Hynes v. Grimes Packing Co., 337 U.S. 86, 103-04 (1949); Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 176-78 (1947).

to unilaterally effect radical changes in the status of Indian reservations. These changes are generally subject to consequences that only apply between the United States and the tribes themselves and not between the tribes and third persons.[27] Thus, the Ninth Circuit was accurate in its holding that Congress had the power "to extinguish whatever rights were created by the 1882 Order." [28]

Petitioner attempts to circumvent the language and history of the 1891 Act by asserting that the exclusion of the disputed land from the trust patent was somehow contrary to the purposes of the Mission Indian Relief Act and thus of no consequence.[29] Yet the very case petitioner relies upon, *Arenas* v. *United States*,[30] which was concerned with the manner in which the Secretary of the Interior was to allocate and establish these reservations, is itself founded upon the premise that the 1891 Act had the prospective purpose "to settle these several bands on suitable reservations and [issue] appropriate patents . . . ." [31] Nor was the 1891 Act "ambiguous" as petitioner attempts to suggest.[32] As explained above, the Act provides clear directions on how "to select a reservation for each band." [33] The well-known principles of interpretation applicable to Indian statutes have not been violated by the Ninth Circuit which, in construing the 1891 Act,

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[27] United States v. Sioux Nation, 448 U.S. 371, 403 (1980); Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). *See also*, Pechanga Band v. Kacor Realty, Inc., No. CV-78-4499-MML (C.D. Ca. August 22, 1980) (Petition, Appendix A at 17).

[28] Pechanga Band v. Kacor Realty, Inc., 680 F.2d at 74.

[29] Petition at 5-6.

[30] 322 U.S. 419 (1944).

[31] *Id.* at 421.

[32] Petition at 6.

[33] Mission Indian Relief Act § 2, 26 Stat. 712 (1891).

was specifically aware of the "special protection" afforded Indian tribes in these matters.[34]

B. *Authority Under the 1891 Act Was Properly Delegated and Implemented by the Secretary of the Interior.*

Petitioner attempts to argue that the issuance of the 1893 trust patent by the Secretary of the Interior was not of "equal stature or dignity" to the 1882 Executive Order and therefore could not extinguish any interest created by it.[35] Petitioner also contends that, in any event, the 1893 trust patent did not purport to terminate the reservation status of the omitted parcels.[36] These arguments are legally and historically unsound.

The contention that the actions undertaken pursuant to the 1891 Act which caused the issuance of the 1893 trust patent by the President could not override the 1882 executive order is without foundation. Both forms of executive action, the 1882 executive order and the 1893 trust patent, were derived from specific Acts of Congress, the 1864 Act and 1891 Act, respectively.[37] The 1864 Four Reservations Act authorized the creation by the President of executive order reservations while the 1891 Mission Indian Act afforded comparable authority to the Secretary of the Interior to provide permanent settlements for the Mission Indians through the issuance

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[34] Pechanga Band v. Kacor Realty, Inc., 630 F.2d at 75.

[35] Petition at 8.

[36] *Id.*

[37] The 1886 executive order referred to by petitioner, Petition at 8, whereby President Cleveland removed certain land from the 1882 executive order reservation, was obviously issued pursuant to the 1864 Act. That removal occurred well in advance of passage of the 1891 Act and demonstrates the different approaches that were followed by the two statutes.

of trust patents.[38] As a result, the actions of the Secretary of the Interior resulting in a trust patent to petitioner which did not include the land at issue were most certainly of "equal stature and dignity" to the initial creation of petitioner's interest, if any.[39] This is particularly true since the 1891 Act was specifically designed to overcome the problems and uncertainties caused by the existing executive order reservations.

Petitioner's second assertion, that the Secretary did not intend to reduce the size of the reservations and that his failure to include the land in the final trust patent was in error or "mere inadvertance" and not imputable to the tribe is also without support. Under Section 3 of the 1891 Act, the Secretary of the Interior was charged by Congress to cause the final trust patents to be issued, which he did in this case in 1893.[40] Under that law, it was clearly the Secretary's role to ascertain whether there were any "valid objection[s]" to any proposed patent and to insure that "no patent shall embrace any tract or tracts to which existing valid rights have attached."[41] These legal obligations provided the foundation for the decision-making process, and caused the exclusion of the land from the reservation. There was no form of inadvertance or indirect approval as petitioner would suggest. By specifically determining not to include the land at issue in the Pechangas' trust patent and by affirmatively deciding not to further contest the settler's patents, the

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[38] *Compare* Four Reservations Act § 2, Ch. 48, 13 Stat. 39, 40 (1864) *with* Mission Indian Relief Act § 3, Ch. 65, 26 Stat. 712-13 (1891).

[39] As stated by the Assistant Attorney General, "[t]he whole [Mission Indian Relief] [A]ct shows that it was the intention of Congress to confide to a great extent in the discretion of the Secretary of the Interior." Letter of Assistant Attorney General Shields to the Secretary of the Interior (July 22, 1891).

[40] Mission Indian Relief Act § 3, 26 Stat. 712 (1891).

[41] *Id.*

Secretary of the Interior carried out the function delegated to him by Congress under the 1891 Act.[42]

While petitioner may presently quarrel with the decisions of these officials, it is clear that they comported with the statutory scheme established by Congress in 1891 to solve the very problem raised by this litigation. Indeed, even if these official decisions were made in error, the Court has held that decisions by authorized officials convey good title to those to whom the lands are given.[43]

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[42] Petitioner attempts to rest upon the fact that the Secretary of the Interior, upon the advice of the Commissioner of Indian Affairs, directed the General Land Office to issue a patent for such lands "as are found to be free from conflicts and to subsequently issue a similar patent for such of the remaining tracts as may hereafter become free of conflict." Petition at 3. At the same time, the Secretary sought to determine from the fraud litigation whether the existing conflict could be eliminated. The "conflict" was ultimately resolved in favor of defendants' predecessors in interest by the later decision of the Attorney General, with the concurrence of the Secretary of the Interior, to dismiss that litigation. Thus, if the possible inclusion of the land at issue in a trust patent was in any way left open in 1893 the issue was fully and finally resolved in 1901 by those officials authorized by the 1891 Mission Indian Relief Act and the general land laws to do so.

[43] United States v. Creek Nation, 295 U.S. 103, 110 (1935) ("Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand —not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect confirmed the disposals . . . ."). *Accord*, Confederated Salish and Kootenai Tribes v. United States, 401 F.2d 785, 788 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 1055 (1969); United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 338 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957). This is a far different situation than *Cramer v. United States*, 261 U.S. 219, 234 (1923), Petition at 4-5, where the Court held that the government was without authority to deal with the Indians' land in the manner it had attempted to do so.

C. *The Court of Appeals and District Court Properly Applied the "Disestablishment" Cases to This Set of Facts.*

It has been well established by the Court that a congressional or executive intention to terminate previous reservation land may be ascertained from an express statement to that effect or implied from the surrounding circumstances and legislative history.[44] The application of this method of interpretation to the language, legislative history and surrounding circumstances of the 1891 Act fully supports the conclusion of both lower courts that any interest petitioner acquired by the 1882 executive order was terminated and disestablished by Congress and by the duly-authorized officials of the executive branch.[45]

Indeed, the application of the disestablishment line of cases to the 1891 Act is somewhat easier than those earlier decisions of the Court. This case did not involve the opening up of a portion of an existing treaty reservation to non-Indian settlement as did the majority of "disestablishment" cases. Also, the disestablishment herein involved an executive order reservation rather than a recognized title reservation established by treaty or otherwise in which the tribe in issue may have a permanent, compensible interest. Further, as stated above, the 1891 Act had the sole purpose of the prospective "establishment" of completely new reservations.

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[44] Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973).

[45] This conclusion is also consistent with the result reached in *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941), a decision relied upon by petitioner. Petition at 4-5. In that case the Court held that acceptance of a new reservation requested by a tribe could be viewed as "tantamount to an extinguishment" of pre-existing tribal interests. *Santa Fe Pac.*, 314 U.S. at 357-58. In *Santa Fe Pacific*, as in the instant case, the new reservations were created in an effort to accomodate the competing interests of Indians and settlers. *Id.* at 358.

Both the Ninth Circuit and the district court, after consideration of a detailed documentary record, held that the 1891 Act had extinguished any prior interests in the 1882 reservation. There is no compelling reason for the Court to reconsider the application of these facts to what are now well-established principles of law by granting a writ of certiorari on this issue.[46]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: December 23, 1982

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[46] *See* City of Polson v. Confederated Salish and Kootenai Tribe, 103 S. Ct. 314 (1982) (Rehnquist, J. dissenting to denial of cert.) ("the decision of the Court of Appeals with respect to the 'termination' issue was based on principles derived from cases such as [*Rosebud Sioux*, *DeCoteau*, and *Mattz*] and does not warrant review here.").

APPENDIX

RELEVANT PORTIONS OF MISSION INDIAN RELIEF ACT

An act for the relief of the Mission Indians in the State of California

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.

SEC. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior. They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by said commissioners subject in each case to the approval of the Secretary of the Interior. In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether they are vacant public lands in the vicinity to which they may be removed. And the said commission is hereby authorized to employ a competent surveyor and the necessary assistants.

SEC. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided*, That no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time thereafter. Any such person shall be permitted to exercise the same right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent, in similar form, may be issued for any tract or tracts at any time after the appraised value of the improvements thereon shall have been paid: *And provided further*, That in case any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like

value in lieu thereof, at such place as the Secretary of the Interior shall determine: *And provided further*, That said patents declaring such lands to be held in trust as aforesaid shall be retained and kept in the Interior Department, and certified copies of the same shall be forwarded to and kept at the agency by the agent having charge of the Indians for whom such lands are to be held in trust, and said copies shall be open to inspection at such agency.

[Sections 4 to 8 omitted].